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No. 99-1647

IN THE
Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF BRUCE W. EBERLE & ASSOCIATES, INC. AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Bruce W. Eberle and Associates, Inc., ("Eberle") is a fund raising consultant located in Virginia. Since 1974, it has served nonprofits and other organizations that communicate with the public through the United States mail. Southeastern Legal Foundation ("SLF"), established in 1976, is a nonprofit organization located in Georgia. It is a public interest law firm that relies on public support to finance its operations. Eberle and SLF support the Petitioner's efforts in this litigation to resist ongoing actions by Utah and other jurisdictions that impede free speech rights by imposing registration requirements, regulations, fees and bonds on out-of-state fund raising consultants and their clients. Eberle and SLF operate solely from their offices in Fairfax, Virginia, and Atlanta, Georgia, respectively. Their only "contact" with Utah is the letters that SLF or other Eberle clients send through the United States mail.[1] Eberle and SLF have a direct interest in the issue involved, *i.e.*, whether states such as Utah can bar a Virginia corporation such as Eberle from consulting in the preparation of a client's direct mail letters unless Eberle meets registration requirements and pays fees to a foreign state.

Eberle has an ongoing appeal concerning a citation issued by Utah under the same Utah act challenged by the Petitioner in the present case. Utah and Eberle have agreed to continue that appeal pending the resolution of this case. That litigation involves a letter that SLF mailed nationally after consulting with Eberle in 1997. Eberle has previously filed *amicus curiae* briefs in ATA v. Giani at trial before the United States District Court

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief. *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

for the District of Utah and for the appeal heard by the U.S. Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

The question in this case is whether Utah's imposition of licensing and regulatory requirements on fund raising consultants and their clients who are located in foreign states is a violation of the First Amendment, the Commerce Clause and the Due Process Clause. Eberle and SLF support American Target Advertising, Inc's ("ATA") position that the regulatory requirements are unconstitutional. The court of appeals held that Utah's requirement that a fund raising consultant submit a $25,000 bond prior to consulting with a client from its offices in Virginia was a violation of the First Amendment. The court of appeals also held that granting broad discretion to the director of Utah's Division of Consumer Protection to approve or to deny licenses to fund raising consultants was unconstitutional. However, the court of appeals upheld Utah's remaining registration requirements and the fees for out-of-state fund raising consultants. Eberle and SLF support ATA's position that the latter ruling was erroneous.

First, the court applied the wrong constitutional test for a First Amendment issue as important as direct communication between citizens through the United States mail. The court mistakenly applied the intermediate scrutiny standard of review rather than that of strict scrutiny despite prior cases involving charitable solicitations that used a more "exacting" standard. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State v. Joseph H. Munson Company, Inc., 467 U.S. 947 (1984); Riley v. Federation of the Blind, 487 U.S. 781 (1988). The court also did not fully take into account the chilling effect that the Act can have on parties who, based only on mailing a letter, are suddenly confronted with threats of felony violations from a foreign state. Reno v.

ACLU, 521 U.S. No.96511; 117 S.Ct. 2329; 138 L.Ed.2d 874 (1997).

The courts failed to appropriately analyze the immense degree to which regulations such as Utah's interfere with and block the ability of citizens to exercise their First Amendment rights. Schaumburg, 444 U.S. 620. Regulations similar to Utah's have been enacted in the majority of states and many localities. Currently, 42 states have some form of charitable registration laws. Some counties and municipalities also have such laws, which create prior restraints on the rights of nonprofit organizations to use the United States mail to communicate with citizens. (See amicus briefs filed by the states in the courts below.) The cumulative, detrimental effect of nationwide jurisdiction by jurisdiction registration for a fund raising consultant and its clients using direct mail is staggering and prevents some nonprofits from using one of the most effective means of communicating about political and social issues.

Many organizations cannot possibly afford legal staffs to keep up with statutes, amendments and regulations continuously being enacted by an endless multitude of foreign jurisdictions. Many nonprofits are small organizations that are supported largely by volunteer staff. Because of the registration demands, these small nonprofits must spend thousands of additional dollars to register themselves and pay higher fund raising costs so that their fund raising consultants can also comply with the myriad of state requirements. States are forcing small nonprofits to spend thousands of dollars before they can communicate with the public through direct mail. These expenditures are required at a time when, as shown by a nonprofit's initial decision to raise funds, many nonprofits clearly do not have the money to pay the expenses of registration across the country.

The court of appeals erred in denying that the Act places an undue burden on interstate commerce and violates the Commerce Clause. The cumulative burden of the registration, the fees, the compliance costs, the inevitable fines, a designation as a "felon," and the legal costs severely burden any out-of-state fund raising consultant. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). The court also erred in classifying fund raising consultants as "solicitors." Eberle and others who fit Utah's definition of a "professional fund raising consultant" do not solicit or have custody of any funds raised. Utah's statute has different requirements for "professional fund raisers" who actually do solicit within the state of Utah. The court confused the two classes which indicates that the analysis of the infringement upon constitutionally protected speech was erroneous.

The court also erred in its ruling that the Act did not violate the Due Process Clause of the Fourteenth Amendment. Eberle is a Virginia corporation with its offices in Fairfax, Virginia. It does not have any clients in Utah. Utah's basis for jurisdiction is that Eberle's clients send out letters that may reach Utah citizens. Eberle does not solicit funds in Utah nor conduct any activities there. Thus, it does not have the requisite "minimum contacts" with Utah to fall under the state's jurisdiction for registration and disclosure requirements. International Shoe v. Washington, 326 U.S. 310 (1945). Departure from this standard would mean that consultants in any field could be required to register to do business in a state only because it has a client that arguably has contacts there.

ARGUMENT

INTRODUCTION

Bruce W. Eberle & Associates, Inc. was founded in Fairfax, Virginia, in 1974 and is one of the nation's oldest direct mail fund raising consultants. Eberle has consulted with candidates

on presidential and congressional campaigns as well as for nonprofit 501(c)(3) and 501(c)(4) organizations. Eberle's sister corporation, Fund Raising Strategies, Inc., has also provided similar services to nonprofit organizations. Their clients, such as SLF, have advocated diverse causes such as veteran issues, challenges to government positions on prominent social issues, constitutional issues, wildlife concerns, and many other political and social issues that have been at the forefront of public discussion and debate over the past 25 years.

Like ATA, Eberle provides consulting services to its clients who endeavor to communicate with the public through the U.S. mail. Eberle's clients such as SLF send out information, newsletters, and letters to the general public. These materials commonly include surveys and petitions. They also include requests for support or donations from the public. For decades, nonprofit organizations have used the services of Eberle or others such as ATA to help them communicate through the mail and build effective support to help them advance their causes. This type of communication, made directly from the speaker to the citizen concerning vital public issues, is core political speech that is at the heart of the First Amendment. For example, SLF, using support raised in part from Eberle's services, successfully challenged the Census Bureau's plans to use statistical sampling for the census.[2]

However, since the early 1990's, Eberle, its clients and SLF have suddenly come under an avalanche of state registration requirements. States have adopted various versions of each other's acts, and each has enacted separate registration

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[2] SLF has supported litigants in cases concerning major issues that have previously been before the Court, e.g., the challenge of statistical sampling by the Census Bureau in Clinton v. Glavin, which was heard by the Court as a consolidated case in Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

requirements and fees. Each state requires similar information but the cumulative burden of the fees, bonds and citations has become a serious problem and threatens the ability of nonprofit organizations to disseminate their views as well as the ability of fund raising consultants to assist clients in direct mail. Further, while some states are willing just to accept the applications and fees, others now have claimed the authority to renegotiate or manage an out-of-state fund raising consultant's contractual relationships with its clients.

The cumulative effect of the varying registration requirements of the 42 states and the additional localities is staggering. The paperwork and financial demands of filing each registration with the fee and bond are endless. Virtually no fund raising client can walk the minefield of this number of varying regulations without violating some state's provision or deadline. Accordingly, a state official now has the authority to silence the views of a nonprofit organization with the ever present threat of a minor registration violation. For a fund raising consultant or its clients, the risk increases exponentially because the fund raising consultant may lose its license if *a client* violates a registration requirement. If one of Eberle's clients does not meet any part of a state's registration requirements, Eberle's other clients can have their mail blocked because Eberle's own license is now in jeopardy. This was actually the case with Eberle and SLF where SLF, a Georgia corporation, did not know about Utah's registration requirements and Utah cited both Eberle and SLF for that violation.

In the past few years, Eberle has been besieged by registration requirements from states such as Utah that it has no contact with other than its client sending a letter. These requirements have inhibited Eberle's ability to consult with its clients and pose a severe threat to the rights guaranteed by the First Amendment, the Commerce Clause and the Due Process Clause. For example, in the past three months alone, Eberle,

which has attempted to comply with registration requirements when possible, has had its clients' mailings stopped, threatened or delayed solely because of potential violations of registration requirements by Pennsylvania, North Carolina, Utah, Florida, New York, Tennessee, California, Michigan, Minnesota and New Jersey. Each of these actions by the states, which directly threatened and interfered with the capability of Eberle's clients to communicate with the 116.4 million total residents of those states, occurred entirely because of Eberle's or Eberle's clients difficulties in complying with the labyrinth of state registration requirements.[3] None of these barriers resulted from allegations of wrongdoing or fraud on the part of Eberle or its clients. States, however, issued cease and desist orders and fines of thousands of dollars for failure to keep up with the registration paperwork. The states' imminent threat of civil and criminal penalties for simple paperwork violations is forcing the abandonment of the right to communicate through the mail.

The burdens of the state registration requirements and their enforcement are clearly not de minimus, as is frequently argued by the states. Despite the fact that the only "illegal" act was the sending of a letter, Eberle's clients have been barred from or threatened with being barred from access to states which represent almost half of the entire United States population within the past three months. These actions by states clearly have a chilling effect on free speech. The following will describe such situations, including those under Utah's Act, that Eberle and SLF have faced which have either barred or significantly hindered constitutional rights to communicate with the public.

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[3] Population figures based on U.S. Census Bureau estimates of July 1, 1999 for Utah, Pennsylvania, New York, New Jersey, Florida, California, North Carolina, Tennessee, Michigan and Minnesota.

I. THE COURTS BELOW DID NOT PROPERLY CONSIDER THE CHILLING AND BURDENSOME EFFECT OF UTAH'S ACT AND ITS ENFORCEMENT.

A. Utah Aggressively Enforces Its Act With Citations, Hearings and Fines for the Sending of a Letter.

Utah is aggressively and unconstitutionally enforcing the Act. For the simple act of mailing a letter, Eberle and SLF were threatened with felony violations by a foreign state. On June 17, 1997, Utah alleged that Eberle violated the Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.*, by providing consulting services to SLF in regard to SLF's direct mail fund raising program. Under Eberle's agreement with SLF, Eberle provides consulting services for SLF's direct mail fund raising program, helps to prepare draft copy for SLF's review and approval, and counsels SLF on mailing lists and agreements with vendors.

In attempting to comply with the Act, Eberle had registered in Utah as a professional fund raising consultant in October of 1996. In an unrelated act, Eberle later contracted with SLF on November 1, 1996. SLF conducted a national campaign by mailing its letters containing information about its programs, survey questions for the recipients, and charitable appeals for funds. On June 6, 1997, Sandra Redhage, Secretary of Eberle, received a fax from Utah stating that a letter from SLF, which was not registered, had been received within Utah and Utah did not have a copy of the Eberle - SLF agreement. After communicating with the Division by telephone, Ms. Redhage immediately forwarded Utah the contract, which was received by the state on June 13, 1997. Meanwhile, SLF, which had not been aware of Utah's registration requirements until notified by Utah, immediately proceeded to register with the state.

B. Criminal Violations

Nevertheless, despite these immediate attempts to comply with Utah's demands (which the state has acknowledged were made), Utah issued its citation to Eberle on June 17, 1997, alleging the following violations: 1) Eberle's client, SLF, which was not registered in Utah at the time, mailed certain communications into the state; and 2) Eberle did not submit its contract with SLF to Utah within thirty (30) days of its execution as directed by Utah Code Ann. §13-22-9(2). (Some other states that request contracts require them to be submitted at the time of the next yearly registration renewal.) For violations of the statute, Eberle is subject to the criminal penalties set forth by Utah for Class B misdemeanors. However, the citation noted that, *if Eberle did not demand a hearing within 10 days to contest the allegations, a cease and desist order would be entered against Eberle. After entry of such an order, Eberle would be subject to prosecution for a third degree felony if Eberle's clients, after receiving consulting services from Eberle, mailed into Utah.* SLF was served with a similar citation for not having registered.

C. Despite Eberle's and SLF's Efforts to Comply, Both Were Forced to Have Hearings.

Because of the above, Eberle and SLF were forced to request a hearing to preserve the ability of SLF or Eberle's other clients to mail into Utah. After a continuance, separate telephonic hearings were held on July 31, 1997. Mark Kleinfield, an employee of the Utah Division and the Enforcement Counsel for the case, also served as the administrator, the prosecutor and the "judge" for the hearings.

At Eberle's hearing, Mr. Kleinfield informed the defendants that it would be an informal, administrative proceeding. It was directed by the "judge," who would later make a

recommendation on the case to the Division Director. The judge himself asked leading questions to the state's own witnesses and dismissed the validity of the constitutional arguments presented by Eberle. For example, at the hearing and through its brief filed with the Division, Eberle argued that the statute violated the First Amendment, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment. When presented with these arguments, Mr. Kleinfeld stated that Eberle had waived its right to challenge the constitutionality of the statute by registering with the state as a fund raising consultant. The state asserted, basically, that a party forfeits its constitutional rights when it is forced to apply for a license by a foreign state. Such an unreasonable argument attests that an individual who obtains his driver's license would thus forever waive his right to contest the constitutionality of a motor vehicle statute.

On November 20, 1997, the Division issued an Order which denied Eberle's constitutional arguments, fined Eberle $1,000.00 for the previously stated violations of the Act, and suspended the penalty. The Order also stated that Eberle must "cease and desist operating in violation of" the Utah Charitable Solicitations Act. <u>According to earlier notices sent by Utah, a violation of Utah's cease and desist order would be a third degree felony.</u> Eberle then filed an administrative appeal to the Executive Director of the Division of Commerce.

Although his own Division had specifically addressed and rejected Eberle's constitutional arguments, the Executive Director stated he did not have jurisdiction over the constitutional issues and, without any further consideration, *dismissed* Eberle's appeal. Eberle has now appealed the matter to the state's district court. The appeal has been continued pending final resolution of this case.

D. Continuing Threat of Felonies

Having been presented with a scenario where Utah could impose a third degree felony against Eberle when Eberle or its clients are unaware of a paperwork deadline in a foreign state, Eberle's clients have not mailed to Utah citizens since 1997. Eberle's clients have been denied access to communicating with Utah citizens directly because of the Act and Utah's corresponding threats of felonies. This threat unconstitutionally silences those who now risk criminal penalities only for participating in the public discourse. Reno v. ACLU, 521 U.S. No.96511; Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

II. THE COURTS BELOW SHOULD HAVE CONSIDERED THE CUMULATIVE EFFECT OF OTHER JURISDICTIONS IMPOSING SIMILAR RESTRAINTS ON MAIL COMMUNICATIONS.

As stated above, Eberle, which has attempted to register where it has been required, has been contacted and threatened by states that represent 116.4 million people solely because of registration issues in the past three months alone. Any alleged registration infraction, by Eberle or Eberle's clients, in these states, as shown by the Utah example, has the potential to block Eberle's clients from exercising their constitutional rights. Before the district court, ATA addressed this cumulative hazard of jurisdictions imposing such an avalanche of requirements on communicating through the mail. The states have confirmed the reality of this threat through their own previously filed *amicus curiae* briefs in this case. Over 26 state attorneys general or divisions have joined to file amicus briefs supporting Utah's Act in this litigation. Certainly, their appearances on behalf of their own state laws confirm that this is an issue that has national implications. Any nonprofit sending a letter can now expect to confront coast to coast restrictions and requirements similar to Utah's. Through the recent experiences of Eberle, the

following examples, all arising within the last three months, illustrate the difficulties faced by a party that has actually attempted to comply with the maze of requirements. Eberle has been or is registered with each of the states below.

A. PENNSYLVANIA

Pennsylvania is among the worst states in regard to confusing, burdensome and expensive registration requirements that threaten the constitutional rights of nonprofits. See 10 Pennsylvania Statutes Sec. 162.1 *et seq.* Additionally, Pennsylvania administrators issue cease and desist orders to any fund raising consultant or nonprofit which violate their interpretation of the state's registration requirements. In addition to the cease and desist orders, the entities are subject to criminal penalties and are fined. As an actual example of Pennsylvania's aggressive approach and its chilling effect on free speech, a volunteer-based nonprofit organization located in California had not registered in Pennsylvania and had been communicating with its supporters through the mail for a decade (it had no familiarity with the registration requirements of a foreign state such as Pennsylvania located across the country). Pennsylvania has now posted that nonprofit on their web site identifying them as a recipient of a state cease and desist order. This is done without listing that the violation arose only from a registration issue.[4] (Pennsylvania's long list of organizations that have not been able to meet its stringent registration requirements is at http://www.dos.state.pa.us/charity/c&d_orders.htm.) This listing, which takes place solely for a registration violation, is clearly stigmatizing and effectively encourages nonprofits who cannot afford to meet the state's requirements or cannot risk the

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[4] On May 10, 2000, Eberle learned that Pennsylvania has now also fined this nonprofit $12,000 for being not being registered and has demanded the fine be paid before it will license the nonprofit to mail into the state.

severe threats for noncompliance to avoid mailing to Pennsylvania residents.

Eberle has registered in Pennsylvania and has attempted to meet the state's requirements. Nevertheless, Eberle and its sister corporation, Fund Raising Strategies, Inc., have been fined thousands of dollars and/or had their registrations blocked at the whim of a state administrative assistant's interpretation and enforcement of the Pennsylvania statute.

1. Pennsylvania Has Fined Eberle for Attempting to Comply

Pennsylvania has fined Fund Raising Strategies $2,750.00 this year after it tried to register. The state has claimed that Fund Raising Strategies owes the $2,750.00 in fines because Fund Raising Strategies, which filed its first registration this year and did so voluntarily without any requests or prompting by Pennsylvania, was late in sending in its registration application and its contracts. Although, by filing, Fund Raising Stratgies had actually assisted to help the state in its purported goal of disclosure and having nonprofit information in its files, Pennsylvania continued to insist on collecting the fines and blocked Fund Raising Strategies from receiving its license unless fines, on top of the registration fees already submitted, were paid. This is how Pennsylvania repeatedly treats fund raising consultants and their clients when they do not comply with some minor requirement of the state. When they attempt to comply, they are fined for not perfectly satisfying some past state regulation or deadline.

2. Pennsylvania Attempts to Regulate Out-of-State Contracts

Pennsylvania currently imposes more restrictions on out-of-state parties than any other state. Relying on the same legal theories advanced by Utah, Pennsylvania even claims to have

the authority to dictate how out-of-state entities such as Eberle and its clients draft their contracts. Pennsylvania requires that it provide a certificate of approval for each Eberle contract with a client before any client can mail to residents in the state. This is clearly a prior restraint on First Amendment communications. If any of the state's requirements are not met, Pennsylvania will automatically block the client from mailing into the state. Rather than simply requesting a clarification to a contract or registration, Pennsylvania routinely blocks nonprofits from communicating with Pennsylvania citizens by denying approval of their contracts or applications for trivial reasons.

For example, Eberle was fined $1000 last year although both Eberle and its client had been properly registered with Pennsylvania for years and the state even had Eberle's contract with the client in its files. However, since the client and not Eberle had filed the contract, the state held Eberle in violation of its regulations because Eberle had not followed the normal procedure for the state's "approval" of the contract. Other than to increase the total amount of fines collected by the state there was no basis for the fine: all parties were registered and the state had the contract. However, Pennsylvania refused to waive the fine and held up the issuance of Eberle's license for months until it paid a fine.

Eberle has also had its contracts and registration applications rejected for the following reasons: 1) the state administrator decided that the signatures of a nonprofit's representatives on a contract were not sufficient because the names and titles were not also printed out (rather than clarifying this by telephone the entire contract was rejected); 2) Pennsylvania demands a fixed termination date in the indefinite future to be stated and refuses to accept Eberle contracts with their standard 90 day termination notice for either party to cancel the agreement (Pennsylvania's argument does not make sense: under its interpretation, December 31, 3099, would

somehow be an acceptable termination date for the agreement to protect nonprofits from an open ended contract, but Eberle's guaranteed right for the nonprofit to terminate anytime after 90 days notice is not acceptable); and 3) an administrator rejected an application stating that Bruce and Kathi Eberle, cofounders and directors of Eberle since 1974 who were even listed as residing at the same home address on the registration application, were not also listed as married on the registration form (this provision must have been a legislative error because there is no compelling or even legitimate reason why the Eberle's marital status is relevant).

For minor reasons such as these, Pennsylvania will reject the entire agreement or registration application and thus block Eberle's clients' ability to communicate with Pennsylvania residents. Eberle then must restart the process by resubmitting the contract (after sending it back to the client) or the application. As a result of this delay and wait for Pennsylvania to review the documents, the client or clients can not mail into Pennsylvania for additional weeks or months. The ability for Eberle's clients to mail in Pennsylvania has become subject to the judgment of an single administrator.

Eberle has raised the problem to Pennsylvania of registration costs for nonprofits who are sending their first mailing and cannot afford the registration costs for themselves or for their fund raising consultants. Pennsylvania regulators even acknowledged this problem of the cost and burden on small mailings but said it was a question for the legislature. Because Eberle and its clients are not from Pennsylvania, they have no representation in the Pennsylvania legislature.

Because of the fines, the cease and desist orders, and the administrative roadblocks, many clients and fund raising consultants now avoid sending any client mailings to Pennsylvania residents altogether. This result does not comport

with the intent of the First Amendment, the Commerce Clause or the Due Process Clause.

B. North Carolina

In February 2000, North Carolina refused to grant licenses to Bruce W. Eberle Associates, Inc. and to Fund Raising Strategies, Inc. although each had complied with all of the state's registration requirements. See N.C.G.S. Chapter 131F *et seq*. Despite the fact that North Carolina's statute has no requirement that a fund raising consultant's registration status be linked to that of its individual clients, North Carolina rejected the registrations because it claimed some of Eberle's or FRS's clients had not filed or renewed their own registration applications. Eberle repeatedly informed North Carolina that the state could contact the nonprofits directly if it was their position that the state's registration requirements would apply to them. Eberle had even provided the addresses of its clients in its own registration applications. Regardless, for two months North Carolina refused to issue Eberle or FRS a license because of its clients' registrations. This action jeopardized all of their clients' access to the 7.6 million residents of North Carolina.

North Carolina's position, like Utah's, is untenable: a single client of Eberle's that is a completely separate entity with no other association with Eberle other than the direct mail program can cause the revocation of or the delay of Eberle's license. By not registering or renewing its application, this client, without Eberle's knowledge, could jeopardize Eberle's active registration status. Accordingly, all nonprofits who use a fund raising consultant are now at the peril of other nonprofit clients' registration status who are working with that fund raising consultant. A single nonprofit who cannot comply with the maze of state registration requirements can imperil the

registration status of its fund raising consultant.[5] Because of the massive set of regulations that the states have enacted nationwide, it is inevitable that charities and nonprofits will not be able to comply with all the requirements. Therefore, using these violations as justification, state administrators now have the ability to silence and penalize nonprofits and their fund raising consultants at almost any time.

C. Florida; New York, New Jersey, Tennessee, California, Michigan and Minnesota

In the last three months, Eberle's clients have had their mailings jeopardized by registration requirements of Florida, New York, New Jersey, Tennessee, California, Michigan and Minnesota as set forth below:

1. Tennessee has informed Eberle that it must "cease all contractual obligations on behalf of a client" because the client is not registered in that state (Eberle is again in the situation where its registration position is put into jeopardy because of a client who may not even be aware of a foreign state's requirements). See T.C.A. § 48-101-501 *et seq.*;

2. Florida, which has recognized that Eberle did not have to register since it did not have any contacts with the state, rejected an Eberle client's registration because it listed Eberle as the fund raising consultant (it was later accepted). See Chapter 496 Florida Statutes;

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[5] On May 8, 2000, North Carolina notified an Eberle client that an unpaid $25.00 late charge had been imposed after the client filed its registration in June of 1999. The client, a nonprofit in Virginia, denies ever being notified about this additional fee but North Carolina is now demanding $300.00 for the nonpayment of the original $25.00 fee. The North Carolina administrator also stated that he has the authority to find the client and Eberle, as its fund raising consultant, in violation of the state's registration requirements starting from June 1999 because the client was not considered registered because of the unpaid $25.00 fee.

3. New York, which requires a yearly application fee of $800 (certainly not a small administrative fee), also claims extraterritorial jurisdiction over contracts and has recently taken the position that it has the authority to require that Eberle and its client change contract language that is not even applicable to Eberle's current services as a fund raising consultant (the contract is agreeable to both Eberle and the client and is only an issue for New York administrators because of the state's registration definitions - the same contract has been filed and accepted by New York and other states for years). See New York Executive Law, Article 7-A;

4. New Jersey has demanded that Eberle file a copy of a client's contract and pay an additional $30 for the filing although the state already has had the same contract filed for the past few years (state demands such as this again raise the question of whether the goal of registration is actually disclosure or merely an attempt by the state offices to raise funds). See N.J.S.A. 45:17A-18;

5. California has now demanded that Eberle stop serving its clients or register after the state changed its registration requirements to include fund raising consultants who do not solicit and do not have custody of any funds raised. See California Government Code Sec. 12599.1;

6. During preparation of this brief in May 2000, Michigan and Minnesota both ordered Eberle to take action regarding registrations (Michigan demanded a client's contract along with a "contract summary" required by the state, and Minnesota ordered that all mailings of two clients be barred because the clients had not registered.) See Michigan Statutes, 1975 PA 169; Minnesota Statutes Sec.309 .52;

D. Cumulative Effect

As depicted by the above examples, fund raising consultants and their clients are in danger of being "nit-picked" to death by the state administrators. Most fund raising

consultants and their nonprofit clients are small organizations (many rely primarily on volunteers) and cannot afford to keep up with the maze of regulations. In the case of Eberle, full time staff members, as well as its attorneys, devote tremendous and ever increasing amounts of time to complying with state registration requirements. Further, the above examples show how a few administrators in various states can jeopardize the ability of nonprofits to mail to 116.4 million state residents in a period of three months. The right of nonprofits to communicate across state lines should not be subject to the arbitrary decisions of state administrators.

III. MULTIPLE REGISTRATIONS ARE NOT THE LEAST RESTRICTIVE MEANS AND ARE PRIMARILY A BENEFIT TO STATE COFFERS.

Using their registration fees, states are now able to collect sizeable amounts of revenue from nonprofits and fund raising consultants who are the parties that, according to the states' arguments, the state is supposedly monitoring for their spending. For example, Pennsylvania's internet site claims to have 6400 charities registered with their Bureau of Charitable Solicitations. (This number is so high because of the Bureau's aggressive practice of threatening fines and penalties for not registering and their admitted practice of having sources collect bags of mail so the Bureau's Special Investigators can search for unregistered charities.) With Pennsylvania's application fees for nonexempt charities ranging from $100 to $250 apiece, Pennsylvania's yearly revenue from the nonprofits it is seeking to protect is at least $640,000. Add the registration fees for fund raising consultants and the enormous amount of fines it imposes (including the $12,000 fine referenced earlier) and it is clear that Pennsylvania has collected millions of dollars from nonprofits and their fund raising consultants. Of course, this does not, when considering the cost to nonprofits, include the administrative time and the legal costs borne by nonprofits, fund

raising consultants and others that, in most cases, dwarf the amounts actually paid to Pennsylvania. To determine the annual national costs of registration and their financial benefits to the states, the above figures have to be multiplied by every other jurisdiction in the country that imposes these registration requirements.

The costs of the redundant and burdensome registration requirements show that the process is not the least restrictive means of promoting the states' stated purpose of fraud prevention. Federal and state fraud statutes already cover the fraud issue that the states claim to be protecting. Any fraudulent action by a nonprofit or its fund raising consultant would be punishable under those statutes. Further, the Internal Revenue Service and other groups are making most of the information requested by the states available on the internet. The I.R.S is already providing its Form 990's available on guidestar.org. These are exactly the same 990's that are requested by the state registrations and disclose fund raising costs and other information. In fact, if the states had acted in the least restrictive means possible in an attempt to maintain their registration requirements, they could have required information from each of their own in-state fund raising consultants and charities and then pooled their information with that of other states in one location on the internet. Other than providing each state their separate revenue stream, this would have allowed the same information to be available without forcing the incredibly burdensome process of nationwide state by state and locality by locality registration.

IV. CONCLUSION

For the reasons set forth above, we respectfully urge this Court to grant the Writ of Certiorari.

Respectfully submitted,

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